

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:

Energy Answers Arecibo, LLC
(Arecibo Puerto rico Renewable Energy Project)

PSD Appeal No 14-04

MOTION TO RECONSIDER

TO THE HONORABLE BOARD MEMBERS:
COMES NOW, Leonardo Ramos-Hernandez, filing PRO
SE, respectfully ALLEGE, EXPOUND AND PRAY:

On May 30th 2014 the Board entered an order dismissing the petition at bar for alleged lack of jurisdiction (preemptory abstention).

The Board based this assertion on a combined effect of a duvious self imposed jurisdictional preemption in the related March 25th order in the Appeal nos 13 05-09 of the above caption permittee and the April 10th 2014 order denying extension of Time to file for reconsideration which considered all but two of the issues raised in the petition at bar. The issues not previously presented were the validity of the CO2 biogenic emissions cap and the validity of the 1993 Cambalache wind data in the absence of a disclosure of a Quality assurance regime for data collection.

Nevertheless, on the issues previously raised, the Board avoided ruling on the merits by declaring them untimely rised "new issues" on the April 10th order which is founded on the jurisdictional timeframe started with the issuance of a final permit on June 13th 2013.

Ordinarily the Board would have denied relief of previously raised issues as a res judicata. Instead the Board opted to assert a self imposed abstention under the guise of lack of jurisdiction.

The Board disclosed no authority to deviate from the long standing principle that a Federal Court cannot avoid their duty to exercise the jurisdiction conferred upon them:

We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress. See, e. g., *Colorado River*, 424 U. S., at 821 (“[F]ederal courts have a ‘virtually unflagging obligation . . . to exercise the jurisdiction given them’ ”); *England v. Louisiana Bd. of Medical Examiners*, 375 U. S. 411, 415 (1964) (“ ‘When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction’ ”) (quoting *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 40 (1909)); *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821) (federal courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not”).

Quackenbush v. Allstate Insurance Company, 517 U.S. 706, 716 (1996)

Thus the Board's argument fails and it remains its duty to exercise its jurisdiction on the timely filed Petition for Review.

Moreover there is an independent source for jurisdiction: 40 CFR § 71.7 (f) (iii) and (iv)
§ 71.7 Permit issuance, renewal, reopenings,
and revisions.

(f) Reopening for cause. (1) Each issued permit shall include provisions specifying the conditions under which the permit will be reopened prior to the expiration of the permit. A permit shall be reopened and revised under any of the following circumstances:

(iii) The permitting authority (or EPA, in the case of a program delegated pursuant to § 71.10) determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit.

(iv) The permitting authority (or EPA, in the case of a program delegated pursuant to § 71.10) determines that the permit must be revised or revoked to assure compliance with the applicable requirements.

It also appears the Board is asserting that the 40 CFR 124.19(l)(2)(iii) as an authority upon which base its attempt to abstain.

The Board misreads the following passage as its authority to deny jurisdiction to all Petitions for Review after Remand:

(l) Final disposition and judicial review.

(1) A petition to the Environmental Appeals Board under paragraph (a) of this section is, under 5 U.S.C. 704, a prerequisite to seeking judicial review of the final agency action.

(2) For purposes of judicial review under the appropriate Act, final agency action on a RCRA, UIC, NPDES, or PSD permit occurs when agency review procedures under this section are exhausted and the Regional Administrator subsequently issues a final permit decision under this paragraph. **A final permit decision must be issued by the Regional Administrator:**

...

(iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Environmental Appeals Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies."

The passage was adopted in 2013 as follows:

<https://www.federalregister.gov/articles/2013/01/25/2013-01318/revisions-to-procedural-rules-to-clarify-practices-and-procedures-applicable-in-permit-appeals>

78 FR 5284

In addition, EPA is clarifying a provision in section 124.19 addressing when final agency action occurs following the disposition of an appeal by the Environmental Appeals Board.

As the reader can see the purpose of the provision is exclusively to address the calendar date when the period to file for Judicial Review starts. It is by no means an authority to preempt any Petition For Review pursuant to 40 CFR 124.19(a). Moreover, the phrase "For purposes of judicial review under the appropriate Act..." 40CFR124.19(l)(2) limits the context of the provision and denies any application of its words to a new or any Petition within the Administrative context.

Finally, the Board unpermissively exploits the grammar error in the provision that uses a comma before the

words "unless the Environmental Appeals Board's remand order..."

That creates the semantically wrong sentence

"A final permit decision must be issued by the Regional Administrator upon the completion of remand proceedings if the proceedings are remanded, unless the Environmental Appeals Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies." Any English literate can see that those are two distinct and separate sentences that cannot be joined by a comma. But even with the clear grammar error, the meaning of the provision is easily interpreted as a power of the Board to deny standing for judicial review to a petitioner who passively fails to pursue his claims at the administrative forum on remand; consistent with the sound principle of preservation of issues for judicial review. As for second wave petitioners, the provision is silent. Proper reading of the provision would move the sentences to read as follows:

"For purposes of judicial review under the appropriate Act, final agency action on a RCRA, UIC, NPDES, or PSD permit occurs **when agency review procedures under this section are exhausted** and the Regional Administrator subsequently issues a final permit decision under this paragraph." But in the case the Environmental Appeals Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies, petitioners will lose standing on Judicial Review on non compliance.

In summary, the provision used as basis for authority to deny jurisdiction is only applicable for purposes of judicial review and not applicable within EAB agency review context, the Board misread the provision by omitting the additional requirement of exhaustion of agency review procedures in bold above, there is no authority conferred to the Board to issue a preemptive abstention on March 25th 2014, the March 25th 2014 order was not an expressed denial of jurisdiction, there is an independent source of jurisdiction at 40 CFR 71 (f), and the board's citation of 40 CFR 124.19(l)(2)(iii) impermissively omits the words " **A final permit decision must be issued by the Regional Administrator...**"

For as much as a Res Judicata is being enforced, it fails as the Board denied review on the merits of the issues raised previously declaring them "new issues"

Finally for as much as the Board denies jurisdiction pursuant to the due process clause of the fifth amendment in regards as improper Public Notice, it fails as the board previously conceded jurisdiction but denied relief based on lack of standing as it asserted that I failed to claim due process harm on my person. (April 10th denial of Intervention)

WHEREFORE I respectfully request the dismissal of the case at bar be vacated.

In Barranquitas PR this 12 of June 2014

/s/ Leonardo Ramos-Hernandez
Leonardo Ramos-Hernandez
HC 4 Box 2925
Barranquitas PR 00794

CERTIFICATE OF SERVICE

I CERTIFY that on this date I have notified this MOTION TO RECONSIDER

Via email as follows:

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In Bayamon Puerto Rico this 12th of June 2014

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